Supreme Court of the United States.

OCTOBER TERM, 1902.

SOLOMON L. SWARTS, TRUSTEE IN BANKRUPTCY OF SIEGEL-HILLMAN DRY GOODS COMPANY,
APPELLANT,
vs.
L. F. HAMMER, JR., COLLECTOR OF THE REVENUE OF THE CITY OF ST. LOUIS, MISSOURI,
APPELLEE.
No. 641.

STATEMENT AND ARGUMENT FOR APPELLEE.

STATEMENT.

The Siegel-Hillman Dry Goods Company, of the city of St. Louis, Mo., was adjudged bankrupt on February 8, 1900; and thereafter, on March 8, 1900, Solomon L. Swarts was elected and qualified as trustee of the bankrupt estate. On the 1st of

June, 1900, said Swarts, as such trustee, had in his hands, and on deposit in the designated depository in the city of St. Louis, Missouri, the sum of $68,-320.00 in money belonging to the bankrupt estate. On February 24, 1902, L. F. Hammer, Jr., appellee, Collector of the Revenue for the city of St. Louis, filed before the Referee, Walter D. Coles, Esquire, a petition alleging that State, school and city taxes for the year 1901 had been regularly assessed against the property in the possession of said trustee on the 1st day of June, 1900, said property being said sum of $68,320.00 in money before mentioned, and that a tax bill for said taxes, properly certified, had been delivered to said collector for collection, and prayed that the Referee make an order, directing the trustee to pay him the sum of $1,298.08, the amount of said tax bill, together with the accrued penalties, commissions and fees, as provided by law. The trustee, thereafter, on February 24, 1902, filed an answer to the petition of the collector, denying that the taxes sought to be collected by the petitioner were a legal and proper charge against the trustee or that the same ought to be paid by said trustee out of the funds of the estate in his hands. The matter came on to be heard before the Referee, and, on June 16, 1902, the Referee made an order directing that the trustee pay to the petitioner the sum of $1,298.08, the amount of said tax bill for the year 1901, together with the accrued penalties and fees provided by law.

The opinion of the Referee, which is contained on pages 3 and 4 of the Transcript of Record in this

court is here set out for ready reference. It was as follows: —

> The petition of the collector in this case presents the general question whether property in the hands of a trustee in bankruptcy is subject to taxation under the statutes of this State. I have carefully considered the briefs of counsel, the relevant provisions of the statutes, and the pertinent cases, and have reached the following conclusions: —
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> 1. A trustee in bankruptcy is, by virtue of the provisions of the bankrupt law (Section 70), vested with plenary title to all the property of the bankrupt, not declared to be exempt. The fact that the trustee holds such title in trust for the purposes declared in the act, does not in any way impair his title, and such title is complete and effectual as against all the world. Until a dividend is declared, or a distribution ordered, no creditor of the bankrupt estate has any title attaching to the whole or to any part of the property in the possession of the trustee; and a creditor having an allowed claim, cannot properly be considered the owner of an undivided interest therein. Until a distribution is ordered, the right of a creditor is limited to securing compliance, on the part of the trustee, with the provisions of the act, regulating the administration and distribution of the estate.
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> 2. The property of a bankrupt estate in the hands of a trustee in bankruptcy, is " under the care, charge, and management " of such trustee, within the meaning of Section 9144 Revised Statutes of Missouri, 1899, and it is therefore

the duty of such trustee to make return of such property for purposes of taxation. The foregoing conclusion seems to follow necessarily, from the fact that the trustee has title to the property of the bankrupt estate, and is charged by law with the custody, preservation and management thereof. The mere fact that the bankrupt law imposes certain restrictions upon the trustee's right to deal with the property, and throws certain safeguards around his right to control it, does not impair or invalidate the foregoing conclusion. (State v. Burr, 143 Mo. 209.)

3. While Section 64a of the bankrupt law seems to relate solely to taxes "due and owing by the bankrupt," prior to bankruptcy, Section 64b provides for the payment in full out of the bankrupt estate of the "actual and necessary costs of preserving the estate subsequent to filing the petition." The latter provision is of a very comprehensive character, and was unquestionably intended to provide for the payment of all proper expenses and charges incident to the continued existence and preservation of the assets of the estate. Property in the hands of a trustee in bankruptcy is embraced within the terms of the State statutes imposing taxes, and I can see nothing in the policy or purposes of the bankrupt law, which would justify the conclusion that Congress intended that such property should be held exempt from the burden of State taxation.

4. To impose upon trustees in bankruptcy the duty of making returns and of paying current taxes will certainly tend to obstruct and prolong the administration of bankrupt estates, but that

fact does not justify the conclusion that such trustees are not obliged to pay taxes. Where the law clearly imposes the duty of paying taxes, the delay and inconvenience resulting from compliance with the law, is no excuse for non-compliance, and the "argument from convenience" has no application in such a case.

5. So far as there have been any adjudications upon the question, the conclusions reached are in conformity to the foregoing views. In re Conhaim, 100 Fed. 268; 4 American Bankruptcy Reports, 58; In re Keller, 109 Fed. 131; 6 American Bankruptcy Reports, 351.

In accordance with the foregoing views, the petition of the collector is sustained, and the trustee is ordered to pay the petitioner the sum of $1,298.08, together with the accrued penalties, and the fees, provided by law."

The question being certified by the Referee to the Judge of the District Court of the United States for the Eastern Division of the Eastern District of Missouri for his opinion thereon, Judge Adams, on June 25th, 1902, ordered that payment be made by the trustee to appellee of the amount of the tax bill, viz., $1,298.08; the order of the District Court being set out on page 5 of the Transcript of Record in this court.

An appeal having been taken on behalf of the Trustee to the Circuit Court of Appeals, Eighth Circuit, the decree of the District Court was affirmed, the opinion of the Circuit Court of Appeals, delivered by Caldwell, Circuit Judge, as contained on pages 10 and 11 of the Transcript of

Record in this court, being here set out for convenient reference. It was as follows: —

"United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1902.

Appeal from the District Court of the United States for the Eastern District of Missouri.

Solomon L. Swarts, Trustee in Bankruptcy of Siegel-Hillman Dry Goods Company, Appellant, vs. L. F. Hammer, Jr., Collector, etc., Appellee.	No. 1806.

Before Caldwell, Sanborn and Thayer, circuit judges.

Caldwell, circuit judge, delivered the opinion of the court: —

Solomon L. Swarts, as trustee in bankruptcy of the Siegel-Hillman Dry Goods Company, had in his hands as such trustee, the sum of $68,320 belonging to the bankrupt estate, which sum was deposited to the credit of the trustee in the designated depository of the court. This money was so held by the trustee at the time appointed by the law of the State for the assessment of moneys, and other personal property, and was duly assessed to the trustee. The trustee refused to pay the tax on

this money in his hands, claiming that the bankrupt law exempted it from taxation. The referee decided it was liable to taxation, and this decision was affirmed by the District Court and the trustee appealed to this court.

The money was clearly liable to be taxed under the State law and the tax is valid and collectible unless the bankrupt act exempts it from taxation.

Exemption from taxation is never presumed. The legislative intent to exempt property from taxation must be clearly and explicitly expressed.

Whether Congress could rightfully exempt from State taxation the property of a bankrupt in the hands of a trustee in bankruptcy and otherwise subject to taxation, we need not inquire. It has not attempted to do so, and it is highly probable it never will. The power of taxation, as well as the power to exempt from taxation is a legislative and not a judicial function. And a bankrupt court no more than any other court can exempt from taxation property in the hands of one of its officers which is liable to taxation under the State law.

It has never been questioned but what property in the custody and control of receivers and trustees of the Federal Courts was subject to taxation under the State law, the same as other like property (Judson on Taxation, section 407 and cases cited).

And this applies to trustees in bankruptcy as well as receivers and trustees in other cases and proceedings in the Federal courts. It is a grave mistake to suppose that property in the possession and custody of an officer of the Federal court, by that single fact, enjoys immunity from taxation. So far from exempting property in

the custody and possession of its officers from taxation, a Federal court, upon proper application, will always order and direct the payment of the taxes duly assessed on such property, and treat the same as a preferred claim against the estate or fund. *Judson on Taxation*, section 541.

The decree of the district court is affirmed. Filed February 2, 1903.

From this decision of the Circuit Court of Appeals, affirming the decree of the District Court appeal was allowed to Supreme Court of the United States.

ARGUMENT.

The only question before the court is whether, under the laws of the State of Missouri, and the bankruptcy law, property of a bankrupt estate should, pending administration, bear the ordinary State and municipal taxes?

I.

If such a tax is to be imposed, it must be based upon some law of the State of Missouri. It would seem, therefore, eminently proper to examine, first, the laws of Missouri, and see whether, by those laws, such property is taxable, and whether provision has been made for assessment against the trustee.

The first query naturally is: Do the Constitution and statutes of the State make such property taxable?

The answer is that, by positive enactment, *all property* in the State, real and personal, is made taxable, except that which is specifically exempt. Section 9118, R. S. of Mo., 1899, is as follows: —

> "For the support of the government of the State, the payment of the public debt and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 6 of Article X of the Constitution of the State makes specific exemption of State, county and municipal property and cemeteries, and provides that the legislature may exempt certain other classes of property. Acting under this license, the legislature has, by Sections 9119 and 9120, R. S. 1899, exempted certain classes of property. Section 7 of Article X of the Constitution provides that exemption of property other than that enumerated in Section 6 (and provided for by Sections 9119 and 9120) shall be void. Sections 9119 and 9120 are as follows: —

> "9119. The following subjects are exempt from taxation: First. All persons belonging to the army of the United States. Second. Lands and lots, public buildings and structures, with their furniture and equipments, belonging to the United States. Third. Lands and other property belonging to this State. Fourth. Lands and other property belonging to any city, county or other municipal corporation in this State, including market houses, town halls and other public structures, with their furniture and equipments, and all public squares and lots kept open for health, use or ornament. Fifth. Lands or lots of ground granted by the United States or this State to any county, city or town, village or township for the purpose of education, until disposed of to individuals by sale or lease. Sixth. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town to the extent of one acre. And lots one mile or more distant from such cities or towns to the extent of five acres, with the build-

> ings thereon, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, shall be exempt from taxation for State, county or local purposes."
>
> "9120. The real estate and personal property which may be used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this State, shall be exempt from taxation for State, county, city, or other municipal purposes."

It is not contended that these exemptions cover property belonging to a bankrupt estate.

Since the law makes all property taxable, except that specially exempted, and since the property of bankrupt estates is not exempted, it seems to follow that such property is taxable. It is not necessary, in order to make property taxable, that it should be specifically mentioned as being taxable. The Supreme Court of Missouri says, in Adelphia Lodge v. Crawford, 157 Mo. 356, l. c. 359: "Taxation is the rule, and exemption therefrom the exception." And again, in Fitterer v. Crawford, 157 Mo. 51, l. c. 59: "As a rule, all property is liable to taxation, and exemption is the exception." In St. Louis v. Wenneker, 145 Mo. 230–239, the Supreme Court met the objection that certain real estate belonging to the Mullanphy Emigration Relief Fund was not made specifically taxable, by saying: "The revenue laws direct an assessment of taxes on all real estate not exempt therefrom. * * * The general laws direct the assessment of real estate. There is

no reason for requiring a special act applicable to this property." Mr. Judson, in his work on Missouri Taxation, at page 88, says: "Our tax system is based upon the theory that all property is taxable, excepting that specifically exempted by the Constitution."

This property is, therefore, clearly taxable, within the meaning of the Missouri revenue laws.

The second query is: What provisions do the laws make regarding assessment and payment of taxes on such personal property?

Section 9186, R. S. 1899, says: —

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

Section 9144 says: —

> "* * * He (the assessor or his deputy) shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such person to make a correct statement of all taxable property owned by such person or under the care, charge or management of such person * * * being in any county of this State, in accordance with the provisions of this chapter."

This list must contain a statement of the various species of property mentioned in the section, including: —

"Fifth, money on hand; sixth, money deposited in bank or other safe place; * * * tenth, all other property not above enumerated and its value. Under this head shall be included * * * every other species of property not exempt by law from taxation."

The law, therefore, says that every person *owning or holding* property shall be liable for taxes, and requires a return of property not only of such as is owned, but also such as is under the care, charge or management of such persons. This seems to us amply broad to cover a trustee in bankruptcy.

By Section 70*a* of the Bankruptcy Law, the title to the property of the bankrupt estate vests in the trustee. The section specifies the date as of which the title vests, namely, the date of the adjudication. By section 70*b* the trustee can sell the property, subject to the approval of the court. By section 70*c* provision is made for transfer of title to purchaser. By section 70*f* provision is made for revestment of title in the bankrupt in case of composition. He is the holder of the legal title of the property of the estate. He has possession of the real and personal property of the bankrupt until sale can be made, and nothing but the money ultimately received from that sale is required to be placed in the depository selected by the court. Pending sale he may, subject always to the order of the Referee, have to perform about every service which is commonly associated with "care, custody and management of the personal property." When a sale is made the deposit of the

proceeds is still in his name. We do not see wherein his title differs *in kind* from that of an ordinary trustee. The Supreme Court of Missouri said in State ex rel. v. Burr, 143 Mo. 209–215: "The statute upon its face clearly indicates that a curator or other trustee shall list not only that which he owns in his own right but that for which he has 'the care, charge or management,' and even holds the curator personally liable for the taxes." It has been held in St. Louis v. Wenneker, 145 Mo. 230, that property held in trust by the City of St. Louis as trustee is taxable.

The title of a trustee in bankruptcy may be likened to that of a trustee under a trust instrument which prescribes the depository and provides for counter-signature of all checks. Would anyone contend that such a trust estate should escape taxation? The management and settlement of a bankrupt estate does not materially differ from the management of an estate in probate under the probate laws of the State of Missouri. The scrutiny of the court is more exact, and more safeguards are thrown about it; but the differences are not such as to, in any way, create a difference in the nature of the right by which the title to property is held. Executors, administrators, and others in charge of estates in probate, are taxable with property under their charge and control; and while, since the year 1893, a special statute (Sec. 9151, R. S. Mo. 1899), has controlled, the general statute above cited (Sec. 9144, R. S. Mo. 1899) imposed the same duty (see State ex rel. Burr, 143 Mo. 209).

The opinion of Judge Lowell, in the case of In re Mitchell, 16 N. B. R. 535; F. C. No. 9658, is interesting in this connection, as showing that, in his opinion, property was assessable in the name of the assignee in bankruptcy. He thus concludes: —

> "The remaining question is whether the assignees were the owners of this property. This closely resembles the question already answered, and the remarks I am about to make are to be taken as applicable to both points. If assignees are mere agents of the courts, and the fund is one in court, there might be reason to say that it was without a definite owner who could be ascertained and assessed; but there is no doubt that assignees are trustees with great powers and large discretion. They have the legal title and control of the property as fully as the bankrupt had, and it has been repeatedly decided that statutes which regulate the administration of their trust, such, for example, as require them not to sell by private contract, or not to bring action, or suit, without an order of court, or the consent of creditors, are merely directory, so that the neglect of them will form no valid objection to a title and no defense to an action or suit."

It seems clear to us that the Missouri statutes and decisions provide for the assessment of the property in the name of the trustee. The argument is made by counsel for the trustee that the statute makes it the duty of owners of claims against the bankrupt estate to list their claims as property, and, therefore, the trustee should not be assessed. The title

to the specific property or fund being in the trustee, our laws would certainly not exempt him from listing the property and paying taxes thereon, even if certain creditors had claims against the estate and should return those claims as taxable. Application of the rule contended for by counsel for the trustee would render nugatory the provisions of Section 9151. This same theory was urged upon the court in the case of Spaulding v. Commonwealth, 38 Ky. 185, above cited. But, as the court said there, the claims of the different creditors were absolutely undetermined and undeterminable. No creditor knows, or can know, with any degree of definiteness what his interest in a bankrupt estate may be. Then, too, the application of such a rule might entirely defeat the State's rights to taxes. Suppose the only creditors were non-residents. In such a case hundreds of thousands of dollars of property might be held by a trustee, under certain contingencies, for a considerable length of time. Although the property might be situated in this State, and under the protection of its laws, it would entirely escape taxation.

The trustee in bankruptcy summed up the law very succinctly in the first two clauses of his opinion. (See Transcript, p. 3.) He says: —

> 1. A trustee in bankruptcy, is, by virtue of the provisions of the bankrupt law (Section 70), vested with plenary title to all the property of the bankrupt, not declared to be exempt. The fact that the trustee holds such title in trust, for the purposes declared in the act, does

not in any way impair his title, and such title is complete and effectual as against all the world. Until a dividend is declared, or a distribution ordered, no creditor of the bankrupt estate has any title attaching to the whole or to any part of the property in the possession of the trustee; and a creditor having an allowed claim, can not properly be considered the owner of an undivided interest therein. Until a distribution is ordered, the right of a creditor is limited to securing compliance, on the part of the trustee, with the provisions of the act regulating the administration and distribution of the estate.

2. The property of a bankrupt estate, in the hands of a trustee in bankruptcy, is "under the care, charge and management" of said trustee, within the meaning of Section 9144, Revised Statutes of Missouri, 1899, and it is, therefore, the duty of such trustee to make return of such property for purposes of taxation. The foregoing conclusion seems to follow necessarily, from the fact that the trustee has title to the property of the bankrupt estate, and is charged by law with the custody, preservation and management thereof. The mere fact that the bankrupt law imposes certain restrictions upon the trustee's right to deal with the property, and throws certain safeguards around his right to control it, does not impair or invalidate the foregoing conclusion. (State v. Burr, 143 Mo. 209).

We believe that the laws of the State of Missouri not only clearly contemplate the taxation of property held by trustees in bankruptcy, but have provided for assessing such property in the name of the trustee.

II.

But we are met with the further argument that since by Section 8 of Article I of the Constitution of the United States, Congress has power to "Establish * * * uniform laws on the subject of bankruptcies throughout the United States," and since Congress has passed a bankruptcy law, we must find explicit authority in the bankruptcy law itself for the imposition of the ordinary property tax by a State against property held by the trustee in bankruptcy; otherwise, although such tax is against *the property*, and although the tax sought to be imposed is the ordinary property tax assessed against all similar property in the State and without discrimination, such taxation is interference with the constitutional rights of Congress and void; and it is further contended that the bankruptcy law does not either by letter or spirit authorize the imposition of this tax. We believe this contention is fundamentally wrong; that the State, as sovereign within its limits, has the right to tax property in the hands of a trustee in bankruptcy *as property*, at least in the absence of any prohibition by Congress. We contend further that exemption from taxation is never presumed; that nothing is to be presumed against the sovereign right of taxation, and that since the bankruptcy law does not prohibit the imposition of the usual property tax by the State upon the funds held by the trustee pending administration, the right to impose such tax exists in the sovereign State; we contend further, that the bank-

rupt law not only does not prohibit but does contemplate and authorize the payment of these taxes and, finally, that the bankruptcy court in the exercise of its equity powers should recognize the State's claim to priority and order the taxes paid. We will consider these points in their order.

It will doubtless be conceded that the power of taxation is an incident of sovereignty, and is co-extensive with that of which it is incident; that as between the government of the United States and the several States, Congress has only such taxing power as the Constitution of the United States delegates to it, while the States retain their original sovereign powers of taxation subject only to the restrictions which that Constitution imposes upon them. The restrictions which arise from the fundamental principle of supremacy of the Federal authority in the exercise of powers vested in the general government are, we will readily concede, as binding as those existing by express provision, and it is one of these restrictions, viz., that of the exemption of the instrumentalities of the Federal government from State taxation, that is here sought to be invoked. The general government has in the exercise of a power conferred by the Constitution enacted a general bankruptcy law. Under the provisions of that law appellant is acting as trustee of a bankrupt estate and the ordinary taxes are imposed by the State upon the property in his possession belonging to the bankrupt estate. No attempt is made to levy or impose a license or tax upon the trustee as such, nor upon the depository as such, nor upon the referee in

bankruptcy as such, nor upon any part of the machinery of the bankruptcy court or its process, nor upon property going through the bankruptcy court as such — simply an ordinary tax levied upon this property as upon all other similar property in this State and without discrimination. Does this constitute an interference with the powers of Congress such as to render the tax invalid?

The principle of immunity from State taxation, which the instrumentalities of government enjoy, is far from an absolute one; indeed, it is a very limited one. Mr. Justice Miller, in National Bank v. Commonwealth, 9 Wall. 353–362, says: —

> "The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is that the agencies of the Federal Government are only exempted from State legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle, founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the State."

Mr. Desty, is his work on Taxation, Vol. I., p. 77, says: —

> "It" (*i. e.*, the doctrine which exempts), "is limited by the principle that State legislation, which does not impair the usefulness or

capacity of such instruments to serve the government is not within the rule of prohibition."

Mr. Cooley, in his work on Taxation, at page 85, says: —

> "And a State may tax the property of Federal agencies with other property in the State, and as other property is taxed, when no law of Congress forbids, and when the effect of the taxation will not be to defeat or hinder the operations of the national government. A different rule, as has been well said, 'would remove from the reach of State taxation all the property of every agent of the government. Every corporation engaged in the transportation of the mails or of government property of every description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption,' and the effect would be to embarrass and injure the State to the benefit of individuals rather than of the nation."

Applying these well-established principles to the case at bar, in what way does the imposition of this tax "interfere with or impair" the efficiency of the operations of the system of bankruptcy which Congress has adopted? It places no burden upon any of the agencies which the government has chosen to effect its purpose; its only effect is to cause this property, which is still a part of the property within the State's borders and under its protection, to bear its reasonable and proper share of the burdens of the State government. Is it

reasonable to extend a doctrine which, as Justice Miller says, is "founded alone in the necessity of securing to the Government of the United States the means of enforcing its legitimate powers" to such a case as this? We think not.

By the same section of the Constitution which gives power to Congress to adopt uniform bankruptcy laws, like powers are conferred upon that body to control interstate commerce, and exemption from State taxation has been sought by corporations engaged in such traffic, the same doctrine being urged as is here invoked.

Applying the principles above enumerated, the courts have uniformly refused to entertain such contentions. The Supreme Court of the United States has consistently upheld the taxing power of the State. It says, in Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18: —

> "No general principles of law are better settled and more fundamental than that the legislative power of every State extends to all property within its borders."

Railroads engaged in handling interstate business have sought to escape State taxation, but the Supreme Court has held that, although they were government agencies, their property was taxable as property within the State.

In Thompson v. Pacific R. R. Co., 9 Wall. 579, a railroad organized under an act of Congress was taxed by the State, and the tax was upheld.

In Railroad Company v. Penniston, 18 Wall. 5,

the franchise was granted by Federal statute, and still the State was allowed to levy its regular taxes against it, the court saying: —

> "It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operation is a direct obstruction to the exercise of Federal powers."

See, also, R. R. Co. v. California, 162 U. S. 91–125.

Telegraph companies have sought the same exemption upon the same ground, but the Supreme Court has held that the fact that the company is engaged in interstate commerce, or that it is an agent of the government, can afford no immunity from the taxation of its property. In Western Union Telegraph Co. v. Gottlieb, 190 U. S. 425, Mr. Justice McKenna says: —

> "These cases (Western Union Tel. Co. v. Massachusetts, 125 U. S. 530; Massachusetts v. Western Union Tel. Co., 141 U. S. 40 and

> others) establish that in estimating the value of the property of a telegraph company situate within a State it may be regarded not abstractly or strictly locally but as a part of a system operated in other States, and that the State was not precluded from taxing the property because the State had not created the company or conferred franchise upon it, or because it derived rights or privileges under the act of July, 1866, or was engaged in interstate commerce."

By the Constitution of the United States, treaties are declared the supreme law of the land; yet it has been held in Prevost v. Grenoux, 19 Howard 1, that treaties cannot control the State in its taxation of the subjects of taxation within its jurisdiction.

We believe, therefore, that the State has a right to impose this tax in the absence at least of a prohibition by Congress.

An examination of the bankruptcy law will at once reveal that there is absolutely nothing in the law which prohibits the imposition of State taxes pending administration; there is no express exemption of the assets of bankrupt estates from State taxation during administration. This exemption will never be presumed. As Judge Caldwell said in his opinion in the case at bar: —

> "Exemption from taxation is never presumed. The legislative intent to exempt property from taxation must be clearly and explicitly expressed."

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The editor of Cooley on Taxation (3d Ed.), p. 356, says: —

> "As taxation is the rule and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms. It cannot be taken to have been intended when the language of the statute on which it depends is doubtful and uncertain."

Taxation is a sovereign right and it will not be presumed that the legislature intended to divest a State of that right without express words showing the intent. As Mr. Justice Clifford says, in United States v. Herron, 87 U. S. 251, l. c. 263: —

> "It is a maxim of the common-law, said Savage, C. J., that when an act of Parliament is passed for the public good, as for the advancement of religion and justice, or to prevent injury and wrong, the king shall be bound by such act though not named, but when a statute is general and any prerogative, right, title or interest would be divested or taken from the king, in such a case, he shall not be bound unless the statute is made by express words to extend to him; for which he cites both English and American authorities, and adds that the people of the State being sovereign have succeeded to the rights of the former sovereign, and that the people of the State are not bound by the general words in the insolvent law.
>
> Sanctioned as that principle is by two express decisions of this court, it would seem that further discussion of it is unnecessary as it has never been questioned by any well

> considered case, State or Federal, and is founded in the presumption that the legislature, if they intended to divest the sovereign power of any right, privilege, title or interest, would say so in express words; and where the act contains no words to express such an intent, that it will be presumed that the intent does not exist. * * * Nor does the bankrupt act impair or supersede the laws for the collection of taxes and that rule also is founded upon the same canon of construction, to wit, that the crown is not bound by the bankrupt laws."

The district judge in deciding the case of In re Sims, 118 F. R. 356; 9 A. B. R. 162, says: —

> "It is difficult to perceive why the primary right of the taxing authority should be denied. A tax is a debt due to government. The levying and collection of such tax is, within the relative scope of existing authority, an exercise of sovereignty, and nothing will be presumed against such sovereign rights. It would have been easily competent for Congress in enacting a uniform system of bankruptcy, to have declared that funds held in process of litigation and for the purpose of distribution should not be taxed; but it has not done this."

The United States courts have refused to recognize discharges in bankruptcy as barring certain claims of the State governments, on the ground that not being explicitly mentioned, the sovereign is not included in the bar. In the case of In re Moore, 111 F. R. 145, l. c. 150, the court, says: —

"Judgments such as the one proved in this case may possibly appear to come within the letter of the statute; but nevertheless, as neither State nor national government is mentioned in the act in this connection, I am persuaded that its operations cannot properly be held to embrace judgments imposed in executing the public criminal law. * * * While in its broadest interpretation this general principle might be considered as applying only to the sovereignty which enacted the statute, still in our dual form of government, and in view of the considerations already suggested, and of an obvious public policy, I think it is clear that the operation of the principle must be so extended as also to exclude the States of the Union when Congress enacts the legislation, and that it should be held in the case before us that Congress did not mean to include within the operations of the bankrupt act fines imposed in executing the criminal laws of a State because it did not expressly legislate to the effect that such fines were dischargeable."

In the case of In re Baker, 96 F. R. 954, l. c. 957, the court said: —

"If Congress had intended that the bankrupt's discharge should operate as a release of his debts owing to the government, it would undoubtedly have so provided in unmistakable terms, especially in view of the rule of construction, which has been established and so uniformly followed for so many years."

In Johnson v. Auditor, 78 Ky. 282, l. c. 285, the court says: —

> "The recognized rule is that the authority of the sovereign is not bound by the words of a statute, unless named therein, if the statute tends to restrain or diminish the powers, rights, or interest of the sovereign."

In Commonwealth v. Hutchinson, 10 Penn. 466 (cited with approval in United States v. Herron, *supra*), the court said: —

> "The same point is ruled under the bankrupt act of the 4th April, 1800, in the United States v. King, Walla. R. 12. It is there decided that debts due to the United States are not barred by a bankrupt certificate. The reason is that the king is not bound because he is not named — a reason equally applicable to the United States, and to the commonwealth which is within its sphere a sovereign State."

If it was the intent of Congress to prohibit the imposition of these taxes, why did it not so provide in express terms? Since it did not it must be presumed that it did not intend any such inhibition.

But the law itself, we think, recognizes the State's rights. It is true that paragraph *a* of section 64 of the act provides for payment only of taxes "legally due and owing by the bankrupt;" this, however, shows that claims for State taxes are considered as "highly meritorious." What consistency would there be in Congress *preferring* a claim for State taxes which accrued prior to bankruptcy and *prohibiting* the imposition of all taxes after

bankruptcy and pending administration? The Supreme Court of the State of Missouri, in construing a very similar provision of the administration law of the State, which provided for classification of "taxes due the State, etc.," held that the word "due" applied as well to taxes to become due as those which were due at the time of the death of decedent.

State ex rel. v. Tittmann, 103 Mo. 553.

Moreover, section 64*b* of the act provides for the payment in full of "the actual and necessary cost of preserving the estate subsequent to filing the petition." It would seem but right to say that the tribute paid to the State and municipal government which protects the property of the bankrupt estate should be considered a necessary cost of preserving the estate. The Referee in deciding the case appears to have considered the authority of this paragraph sufficient. He says (Transcript, pp. 3-4):—

> "While section 64*a* of the bankrupt law seems to relate solely to taxes 'due and owing by the bankrupt' prior to bankruptcy, section 64*b* provides for the payment in full out of the bankrupt estate of the 'actual and necessary costs of preserving the estate subseqeunt to filing the petition.' The latter provision is of a very comprehensive character, and was unquestionably intended to provide for the payment of all proper expenses and charges incident to the continued existence and preservation of the assets of the estate. Property in the hands

> of a trustee in bankruptcy is embraced within the terms of the State statutes imposing taxes, and I can see nothing in the policy or purpose of the bankrupt law which would justify the conclusion that Congress intended that such property should be held exempt from the burden of State taxation."

We believe, further, that the Court of Bankruptcy should, acting under its general equity powers, recognize the justice of the State's claim to priority. Courts of bankruptcy are, by the bankruptcy law, given equity powers, and it has always been recognized that the general rules of equity are to govern the administration of bankruptcy laws. Indeed, a suit in bankruptcy is considered an action in equity. (See Bardes v. Bank, 178 U. S. 524.) The Supreme Court of Missouri has held, in State to use v. Rowse, 49 Mo. 586, that the State's right to priority exists independent of statutory lien; that, "by the common law, all debts due the crown were preferred to claims of private citizens; so far as taxes are concerned, every consideration requires that this rule be regularly observed;" and this decision is cited with approval in Greeley v. Bank, 98 Mo. 458, and State ex rel. v. Tittman, 103 Mo. 553.

It is in the exercise of this equity power that, where title is vested in receivers, courts order payment of State taxes upon property held by the receiver. (See Ex parte Chamberlain, 55 F. R. 704–706; Central Trust Co. v. Railroad, 110 N. Y. 250.

III.

It remains to consider the decided cases in which the question has arisen. It is significant that with one exception, — a decision by a Referee under the law of 1867 — all of the decisions sustain the power of the State to impose the tax.

The case of In re Mitchell, 16 N. B. R. 535; F. C. No. 9658, was decided under the law of 1867. The court decided the question on general principles, independent of the provision of the law which permitted it, and his reasoning is therefore applicable to this case. He says: —

> "The first ground taken by the assignees is that they are officers of the court; that the fund in their hands is in the custody of the law, and therefore not to be disturbed or interfered with by any action on behalf of the State. An able opinion of this purport has been given by one of the registers. (In re Booth.) I cannot subscribe to that opinion. I cannot see any interference or obstruction of the court, or of the law, in taxing to the owner thereof any fund that may happen to be, in whole or partly, in the registry of the court, or under its direction, as was the case with the money here provided. There is no attempt to affix upon it a lien, or in some way disturb the actual custody of the fund. Such an assessment is simply an official declaration that the owner of the fund should pay his share of the public burdens."

In re Booth, F. C. No. 1645, was decided by a register in bankruptcy, also without reference to the

special provision to the law of 1867 allowing assessment of State taxes. This opinion preceded that of Judge Lowell in the Mitchell case, and was considered by Judge Lowell in deciding that case. The register's conclusion is exactly the opposite of those reached by Judge Lowell.

In the case of In re Conhaim, 100 F. R. 268, 4 A. B. R. 58, Judge Hanford says: —

> "The bankruptcy law very justly requires the trustee of a bankrupt estate to pay all taxes legally due and owing by the bankrupt, and the court will not favor any evasion of this law by giving a too literal construction to those words. The manifest intent of the law is that while the estate is in the hands of the trustee his custody shall not constitute a barrier to prevent the collection of taxes which would be collectible under the law if the property had remained in the possession and control of the bankrupt himself."

While the taxes in question were taxes due by the bankrupt, it is evident that the court was of the opinion that possession of property by a trustee should not interfere either with the assessment or collection of taxes.

In the case of In re Keller, 109 F. R. 131; 6 A. B. R. 351, the date of adjudication was December 24, 1900; the trustee was appointed January 7th, 1901. The Iowa statutes provided that property should be listed and assessed against the owner on January 1st of each year for the taxes for ensuing year. The property of the bankrupt was sold Feb-

ruary 12th, 1901, by order, free and clear of all liens; then the State put in its claim for taxes and the question arose whether they should be allowed and if so by whom paid. Now, by Section 70*a* of the bankruptcy law, title to the property of the bankrupt vests in the trustee *as of the date of bankruptcy*. See also In re Annie De Etta Pease, 4 A. B. R. 578; In re Burke, 5 A. B. R. 12. As that adjudication was on December 24th, it would seem that assessment against any person other than the trustee would have been invalid.

The property was certainly in the custody of the bankrupt court after adjudication, and was in process of administration on January 1, 1901, whether the title was in the trustee or not. Taxes assessed against it on January 1, 1901, were taxes assessed against property in *bankruptcy*, and such taxes were not taxes *due by the bankrupt* within the meaning contended for by appellant. The court held that the taxes should be paid, and said: —

> "There is nothing in the language or purpose of the bankruptcy act which justifies the holding that claims for taxes due the State, county or city, are not to be recognized and properly protected by the trustee. Sec. 64, already cited, makes it the duty of the trustee to pay all taxes, legally due and owing, in preference to claims of creditors; and, while it may be true (as is claimed by counsel for the trustee) that this section refers only to taxes that have been levied and are due and payable in the complete sense of those words, yet the enactment of the section shows that Congress recognized claims for taxes to be so highly meritorious that preference in pay-

ment over ordinary debts is granted thereto in the distribution of bankrupt estates. * * * If, under the circumstances, the purchaser is held to take the property free from all liability for taxes for the ensuing year, it would be upon the theory that the title acquired by the trustee in bankruptcy passes to him free from all liability for such taxes, which I can not conceive to be the intent of the act. * * * If it be held that, upon the appointment of a trustee on January 7, the title to the stock of goods vested in him as of the date of the adjudication, which was December 24, 1900, then the trustee was the owner of the goods on the 1st day of January in such sense that when called upon by the assessor, he should have listed the same for taxation."

In the case of In re Sims, 118 F. R. 356, A. A. B. R. 162, decided by the District Court for the Western District of Georgia, the court says: —

"This presents the question, are the funds in the hands of a trustee in bankruptcy liable to State and county taxation in that taxing district when the values in question might have been assessed for taxation had not bankruptcy intervened. * * * Upon principle, however, it seems that the application of the tax collector must be granted. Sec. 64*a* of the act provides: (quoting the section). It is manifest from this provision of the act that Congress had no purpose to deny to the taxing power any valid claim for taxation upon the values in the hands of officials of a court of bankruptcy. On the contrary it was the purpose of Congress to make it obligatory that all the current taxes legally due should be paid. It is true that the act does not expressly provide that funds held

by officers of court pending the litigation shall be liable to taxation. Under the general principle, however, that taxation should be uniform upon all values it is difficult to perceive why the primary right of the taxing authority, whether national, State or municipal, should be denied. A tax is a debt due to government. The levying and collection of such tax is, within the relative scope of existing authority, an exercise of sovereignty, and nothing will be presumed against such sovereign right. It would have been easily competent for Congress in enacting a uniform system of bankruptcy, to have declared that funds held in process of litigation and for the purpose of distribution should not be taxed; but it has not done this. Much light is thrown upon this important inquiry by the decision of the Supreme Court of the United States in U. S. v. Herron, 20 Wall. 251–264; 22 L. Ed. 275. The precise question was not involved but Justice Clifford for the court, quotes with approval the language of Chitty to the effect that:

"'Acts of Parliament which would devest or abridge the king of his prerogatives, his interest, or his remedies in the slightest degree do not, in general, extend to or bind the king, unless there be express words to that effect.'

"In the same opinion we are advised that the framework of the bankruptcy legislation of this country is largely taken from the various acts of Parliament, and 'such acts,' said the learned justice, 'have never in terms, included debts due to the sovereign of the country; and the decisions of the courts of Wesminster Hall for more than a century have held without exception that such acts, or the proceedings under the same, do not discharge debts due to the crown.' The learned justice continued:—

> " ' Nor does the bankruptcy act impair or supersede the laws for the collection of taxes, and that rule also is founded upon the same canon of construction, to wit, that the crown is not bound by the bankruptcy laws; and therefore, says Shellford, on p. 303, the appointment of assignees does not relate to the act of bankruptcy as against the crown process but the bankrupts' personal property is bound under an extent even when tested subsequently to the appointment of the assignees.'
>
> " Here of course the taxing power stands in the place of the sovereign, and the trustee in the place of the assignees."

These cases with the cases at bar constitute the only judicial determinations we have been able to find covering the question at issue.

We do not understand that appellant seriously contends that the fact that some time elapses between the date on which a tax becomes fixed and the date of payment thereof could furnish a basis for denying the State's right to those taxes. That is but a slight administrative difficulty, one which is surmounted every day by administrators, executors, curators, guardians and trustees in this State. It does not in any way affect the validity of the tax.

We respectfully submit that no error was committed by the Circuit Court of Appeals in affirming the decree of the lower court.

Respectfully submitted,

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